IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Ajit Singh vs. Raju Ram and another.

S.B.CIVIL SECOND APPEAL NO.394/2005 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 27.5.2005 PASSED BY SHRI PANKAJ BHANDARI, ADDITIONAL DISTRICT JUDGE NO.3, JODHPUR IN APPEAL NO.57/2004.

DATE OF JUDGMENT ::: 16.11.2005

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. GR Singhvi, for the appellant.

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BY THE COURT:

Heard learned counsel for the appellant.

The appellant is aggrieved against the judgment and decree passed by the trial court dated 25.9.2003 for eviction of the appellant/defendant/tenant from the plaintiffs' shop which was upheld by the first appellate court vide judgment and decree dated 27.5.2005. The suit of the plaintiffs was decreed on the ground of non-user of the premises by the appellant.

According to learned counsel for the appellant, the two courts below have not recorded any finding that the appellant has not used the shop in question rather the suit shop has not been used for the purpose for which it was let out and that is without reasonable and probable cause. According to learned counsel for the appellant, the two courts below committed serious error of law in drawing adverse inference against the appellant on the ground that the appellant did not produce his son in evidence and has not produced the electricity bills for the shop in dispute. In addition to above, according to learned counsel for the appellant, the appellant produced his neighbour as witness who clearly stated that the appellant is doing business in shop in dispute. In view of the above, the findings recorded by the two courts below are factually wrong as well as basic ingredient of relevant provision of law has not been fulfilled, therefore, the suit could not have been decreed.

Learned counsel for the appellant also submits that the suit of the plaintiff was barred by time as the plaintiff

himself admitted that the defendant closed his business in the shop four years ago.

I have considered the submissions of learned counsel for the appellant and perused the reasons given by the two courts below.

It appears that the suit was filed for eviction of the tenant on the ground of default as well as non-user of the suit premises. At the time of filing of the suit, rent of 30 months was due in the defendant/appellant. The appellant admitted in his statement that the electricity connection of the shop was disconnected. However, he stated that the connection was restored subsequently. The defendant took a specific plea that he is doing business in the suit shop, therefore, the defendant himself narrowed down the controversy by taking a specific stand that he is doing business in the shop and there is a specific issue framed by the trial court about non-user of the shop without reasonable and probable cause. For this issue, only the defence of the defendant is that he is using the shop. Rest of the defence is not relevant.

After considering the facts of the case, the courts reached to the conclusion that the appellant close down the shop and is not doing business in the shop. The appellant could have pleaded or could have taken a defence in the alternative, that even if it is found that the suit shop remained closed or the Court records finding against the

appellant about his doing business in the suit shop, then the plaintiff failed to plead and prove reasonable and probable cause for non-user of the shop, therefore, the suit is not maintainable. Such plea was not taken by the appellant before the courts below. The courts below held that the suit shop was closed by the defendant/tenant, therefore, the courts below have recorded the findings wherein non-user of shop without reasonable cause is impliedly there.

So far as drawing adverse inference against the appellant is concerned, it is admitted case that the appellant did not produce his son for whom he is saying that he is doing business at Palanpur and the appellant is not doing business. The appellant's son was material witness because of the fact that according to the appellant, his son is doing business at Palanpur and if the trial court, in the facts of the case, found that he should have been produced which would have given an opportunity to the plaintiff to take benefit of cross examination of the appellant's son, then that is a discretion exercised in the facts of the case and cannot be found fault with it.

So far as question of limitation is concerned, it is clear from the facts pleaded itself that the plaintiff specifically pleaded that the defendant closed the shop since last four years and that cause was continuing at the time of filing of the suit, therefore, even if any cause of action accrued to the plaintiff for filing suit in time

prior also, that is not lost.

In view of the above, if the two courts below decided the issue of limitation in favour of the plaintiff, the courts below have not committed any error.

In view of the above, I do not find any substantial question of law involved in this appeal, therefore, this appeal is dismissed.

(PRAKASH TATIA), J.

S.Phophaliya